Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-189

GERTRUDE BRINKMAN GOSS, ET. AL.,
Petitioners,

versus

ROBERT WINSTON G. ZUCKSWERT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF LOUISIANA

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PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF LOUISIANA

The petitioners, *GERTRUDE BRINKMAN GOSS, MRS. MYRTLE GOSS LOEWER, FREDDY EARL GOSS, MRS. MYRZA GOSS EVANS, DR. VERNON V. GOSS, MERLE GOSS HAIL, KATHLEEN GOSS JAMES, THELMA GOSS AGUILLARD* and *VERTIS GOSS JEFFERIES*, pray that a writ of certiorari issue to review the order or judgment of the Supreme Court of the State of Louisiana.

OPINIONS BELOW

The unreported opinion of the Fifteenth Judicial District Court for the State of Louisiana appears at Appendix A, infra, pages 1a-4a. The opinion of the Third Circuit Court of Appeals for the State of

Louisiana is reported at 304 So. 2d 704 and appears at Appendix B, infra, pages 5a-17a. The denial of certiorari by the Louisiana State Supreme Court, 309 So. 2d 339, appears at Appendix C, infra, page 18a.

JURISDICTION

The denial of certiorari by the Louisiana State Supreme Court was entered on March 7, 1975. See Appendix C, page 18a, infra. By order of this Court dated May 28, 1975, the time for filing a petition for certiorari was extended for an additional sixty (60) days from June 5, 1975, to August 4, 1975. That order appears at Appendix D, infra, page 19a. This petition for certiorari is timely filed within the aforesaid extension period. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

The question which arises is whether hereinafter described application of law by the Louisiana Courts violates the due process and equal protection clauses of the Fourteenth Amendment. An equally important consideration is whether petitioners were dealt with unjustly under the Privileges and Immunities clause of Article 14 §2 of the United States Constitution. It is not contended that the pertinent state law is unconstitutional, but rather that the application of the law in this instance reaches an impermissible result.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment XIV:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the United States, Article IV, Section 2, Clause:

> "The citizens of each state shall be entitled to the Privilege and Immunity of citizens in the several states."

STATE STATUTES

California Statutes

Section 661 California Code of Evidence:

> "A child of a woman who is or has been married, born during the marriage and within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the penal code, or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof."

Section 90 California Probate Code:

> "When a testator omits to provide in his will for any of his children, or for the issue of any deceased child, whether born before or after the making of the will or before or after the death of the testator, and such child or issue are unprovided for by any settlement, and have not had an equal proportion of the testator's property bestowed on them by way of advancement, unless it appears from the will that such omission was intentional, such child or such issue succeeds to the same share in the estate of the testator as if he had died intestate."

Louisiana Statutes

Article 186 Revised Civil Code:

> "The child capable of living, which is born before 180 days after the marriage is not presumed to be the child of the husband; every child born alive more than six months after conception, is presumed to be capable of living."

Article 187 Revised Civil Code:

> "The same rule applies with respect to the child born 300 days after the dissolution of the marriage, or after the sentence of separation from bed and board."

Article 1493 Revised Civil Code:

> "Donations inter vivos or mortis causa cannot exceed two-thirds of the property of the disposer, if he leaves, at his decease, a legitimate child; one-half if he leaves two children; and one-third if he leaves three or a greater number . . ."

STATEMENT OF FACTS

This is a suit to have the last will and testament of Winston D. Goss declared void. Mr. Goss died on January 30, 1973. His will is being contested by Robert Winston Fabricius Goss Zuckswert who alleges that he is the only legitimate son of the decedent and, therefore, entitled to receive one-third of the decedent's estate in accordance with the provisions of Louisiana Forced Heirship Law. Petitioners are the legatees of the testament which has been attacked.

Circumstances Surrounding the Plaintiff's Birth

The decedent and one, Mildred Fabricius, were married on May 26, 1928, in the State of California. The marriage was a short one with the wife filing suit for a California divorce in August of 1930. An interlocutory judgment of divorce was rendered on October 31, 1930. A final divorce was granted in the same proceeding on November 25, 1931.

Plaintiff was born to Mildred Fabricius on August 24, 1932, (274 days after the final divorce decree and 693

days after the interlocutory judgment). The child's name was registered on his California birth certificate as Robert Winston Fabricius. Later, plaintiff's mother changed his name to Robert Winston Goss. In 1933 Mildred Fabricius remarried and, several years after this second marriage, changed her son's name again. This time he was given the last name of "Zuckswert." Robert Zuckswert lived most of his life in California and never saw the individual whom he alleged to be his father.

Winston D. Goss moved to Louisiana to seek employment. On December 31, 1938, he married a second time to Gertrude Brinkman. He lived with her in Louisiana until his death. No children were born of this latter marriage.

The Decedent's Will

The decedent's last will and testament disposed of all of the property of his estate to various legatees including his wife by the second marriage, his brothers and sisters and several descendants of a deceased brother. At the time he made his will he also executed a written affidavit to the effect that he had knowledge of the birth of a child to Mildred Fabricius on August 24, 1932, but that he had been separated from her since 1930 and that he was not the father of this child.

Louisiana Law v. California Law

In the face of conflicting evidence our Louisiana Courts concluded that Robert Zuckswert had not proven that the decedent was his father. It was decided

that his case must rise or fall based on the application of evidentiary presumptions. Both Louisiana and California have such presumptions. Their application depends on several factors. The main factor is the time of the child's birth as contrasted with the time of his alleged parents divorce or separation. Mr. Zuckswert was born within 300 days of his parents' divorce, but more than 300 days after the interlocutory separation judgment.

California law states that a child born within 300 days after the dissolution of the marriage is automatically presumed to be the child of his mother's ex-husband. (Section 661 — California Code of Evidence). In California, as in Louisiana, dissolution of the marriage occurs only after a final judgment of divorce. The law of that state further provides for an interlocutory judgment of divorce which is a counterpart of Louisiana's judgment of separation. See *Estate of Teel*, 34 D. 2d. 349, 210 P. 2d. 1, 1949; *Decker v. Occidental Life Insurance Co.*, 70 C. 2d. 842, 452 P. 2d. 686, 1969. The effect of California's evidentiary presumption on its laws of inheritance is minimal, however, because that state does not recognize forced heirship. See Section 90 — California Probate Code.

Louisiana on the other hand has always been adamant in its protection of forced heirs. See Articles 1493 et. seq., Revised Civil Code. The forced heir concept, however, is carefully balanced by numerous rules regulating a child's proof of filiation. The rule as interpreted by Louisiana Courts provides that an individual born 300 days after a judicial separation is not presumed to be a child of his mother's ex-husband.

See Articles 186 and 187 Revised Civil Code, also *Kaufman v. Kaufman*, 146 So. 2d 199, 1962. Although our codal presumption is similar to California evidentiary law, there is one important distinction. The Louisiana presumption is stricter in that the child must be born within 300 days of a *judicial separation* in order to obtain a paternity presumption. California law extends this presumption so that it operates within 300 days after a final divorce.

In effect, California law presumes cohabitation until the time of divorce regardless of whether or not the parties have obtained an interlocutory separation judgment. Louisiana law presumes that parties to a judicial separation will not cohabit (Article 188 R.C.C.) and, therefore, denies the benefit of a presumption of paternity to the child conceived during that time. See *Kaufman v. Kaufman*, supra. Of course only Louisiana's presumption was enacted for use in connection with the stringent laws of forced heirship.

Application of Law by Louisiana Courts

The trial court gave the plaintiff the benefit of California's evidentiary presumption. Louisiana law was then applied to permit him to inherit under our forced heirship doctrine. If only California law had been applied to determine both status and the right to inherit, then the plaintiff would not have inherited. There is no forced heirship in California and, under California law, the affidavit executed along with the decedent's testament would have dispelled any notion that the decedent wished to bequeath property to the plaintiff. By the same token if only Louisiana law had been applied to determine both status and the right to

inherit then the plaintiff would have had no presumption of paternity since he was born more than 300 days after the interlocutory judgment of divorce. Thus, petitioners would clearly prevail under the laws of either state.

The Third Circuit Court of Appeal for the State of Louisiana, however, affirmed the trial court's decision and the Louisiana Supreme Court denied certiorari stating that the case was correct in its result.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW CONFLICTS WITH THE PRINCIPLES OF DUE PROCESS AND EQUAL PROTECTION ALLUDED TO BY THIS COURT IN *LABINE V. VINCENT*.

In *Labine v. Vincent*, 91 Sup. Ct. 1017, Mr. Justice Black made the following observation:

> "... the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State. Absent a specific constitutional guarantee, it is for that legislature not the life-tenured judges of this Court, to select from among possible laws."

Justice Black was voicing the Court's reluctance to declare unconstitutional a provision of Louisiana Inheritance Law that restricted the rights of an illegitimate child. His thoughts, however, are relevant to this case. His point was that the Louisiana State Legislature has the duty of choosing from among the laws which are permissible in the handling of Louisiana succession property. Our contention is that Louisiana Courts cannot mismatch the laws of several states in such a manner that the application of a harsh doctrine such as forced heirship depends on a criteria such as the claimant's residency.

The fact that the plaintiff's residency was used as a criteria for classifying petitioners' rights does not make the constitutional problems any less obvious or important. The Fourteenth Amendment was aimed at undue favor and individual or class privilege in whatever form it might take. See *Truax v. Corrigan*, 42 Sup. Ct. 124, 257 US 312. If the present decision is allowed to stand future decisions, no doubt, will discriminate against non-resident forced heir claimants as well as Louisiana legatees.

This is not a case in which the decedent and his first wife chose to recognize the plaintiff as their child and met the formal requisites of acknowledgement under California law. Of course interstate comity and the Full Faith and Credit Clause of the Constitution would require the use of California law if this were the problem. California's evidentiary law was applied, however, only because the plaintiff happened to be a resident of that state. The lower courts ignored the fact that the decedent was a Louisiana resident, lived most his life in Louisiana and died in Louisiana. They

further ignored the fact that most of the legatees under the will are Louisiana residents and citizens.

The discrimination is obvious. Residency and state citizenship classifications are clearly invidious. See *Memorial Hospital v. Maricopa County*, 94 Sup. Ct. 1076. If a Louisiana plaintiff had been involved in this suit petitioners would have prevailed. Presumably, petitioners would have prevailed against any citizen of any state having a strict paternity presumption. These results would obtain in factual situations which are otherwise identical to the present case. It is appropriate, therefore, for this Court to determine whether there is some reasonable basis for the discrimination, *Morey v. Doud*, 354 US 457, 77 Sup. Ct. 1344, 1 L. Ed. 2d. 1485 - 1957. We submit that these residency and citizenship classifications bear no reasonable relationship to the consequences which flow from them. See *McLaughlin v. Florida*, 379 US 184, 191; 85 Sup. Ct. 283, 287-288.

2.

CLASSIFICATION OF PETITIONERS RIGHTS BASED ON PLAINTIFF'S RESIDENCY OR STATE CITIZENSHIP VIOLATES THE PRIVILEGES AND IMMUNITIES CLAUSE OF THE CONSTITUTION.

This Court has in the past declared residency classifications unconstitutional as violative of the Privileges and Immunities Clause. See *Doe v. Bolton*, 93 Sup. Ct. 739, 410 US 179. Under that clause it is required that a state classification must at least bear some rational relation to a legitimate state purpose.

See *Weber v. Aetna Casualty & Surety Co.*, 92 Sup. Ct. 1400; 406 US 164. The willingness of the Louisiana judiciary to use residency criteria in dealing with Louisiana's own citizens presents an important and unique constitutional question. It is clear that petitioners' rights of property ownership are fundamentally guaranteed by the United States Constitution. See *Ward v. Maryland*, 79 US 418. Equally clear is the concept that a state cannot abridge a fundamental right of a United States citizen. It makes no difference that the persons whose rights are abridged are citizens of the state which is undertaking the unconstitutional action. See *Colgate v. Harvey*, 56 Sup. Ct. 252, 296 US 404.

The facts giving rise to these problems were emphasized in briefs submitted to the Fifteenth Judicial District Court, Louisiana Third Circuit Court of Appeals and the Louisiana Supreme Court. It was argued before the Appellate Court and Louisiana Supreme Court that mismatching of California and Louisiana law would grant to the plaintiff a status which he did not have under the laws of either state. Those portions of petitioners' briefs appear at Appendix E, infra, pages 20a-21a.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals for the State of Louisiana and the order of the Louisiana Supreme Court.

By their attorneys,

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APPENDIX A

15TH JUDICIAL DISTRICT COURT
PROBATE DOCKET #8106
PARISH OF ACADIA, LOUISIANA

SUCCESSION

OF

WINSTON D. GOSS

REASONS FOR JUDGMENT

Winston D. Goss died on January 30, 1973 leaving a last will and testament disposing of all of the property of his estate to various legatees. The legatees included his second wife, brothers, sisters, and certain nieces. The will is being contested by Robert G. Zuckswert alleging that he is the only son of the testator and therefore, entitled to one-third (1/3) of the testator's estate as his forced portion.

The plaintiff, Robert G. Zuckswert, is the son of Mildred Fabricius, the testator's first wife. Mildred Fabricius and Winston Goss were married in California on May 26, 1928. Mildred Fabricius filed suit for divorce and an interlocutory judgment of divorce was granted on October 31, 1930. A final divorce was granted in the same proceedings on November 25, 1931. Robert C. Zuckswert was born on August 24, 1932, 274 days after the final decree of divorce and 693 days after the interlocutory judgment.

The question is presented as to whether the plaintiff is the legitimate son of the deceased, Winston Goss. The Court feels that this question should be determined by the law of California, Corpus Juris Secundum Volume 10, Section 22. Under the Code of Evidence of California certain presumptions as to legitimacy of children are provided. Section 661 of this code provides as follows:

> "A child of a woman who is or has been married, born during the marriage *and within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage*. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code, or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof." (Emphasis added)

The California Courts have repeatedly held that the entry of an interlocutory decree of a divorce does not dissolve a marriage and such a dissolution occurs only after a final decree of divorce has been rendered.

This is quite different from Louisiana Civil Code Article 187 which states that the child is presumed to be the child of the husband if born within 300 days after the dissolution of the marriage or "After the sentence of separation from bed and board."

This Court feels compelled to follow the California jurisprudence which would clothe the plaintiff with a presumption of legitimacy.

There is no clear and convincing proof to rebut this presumption. The parties obtained blood tests of the mother, the plaintiff and the deceased. A pathologist testified that the deceased could have been the father of the plaintiff according to the blood tests. There was testimony from the mother and some of her friends to the effect that the parties would cohabit after the interlocutory decree.

It is also to be noted that the deceased, Mr. Goss, was aware of the birth of the child to his former wife and on December 4, 1970 when he prepared his last will he also prepared an affidavit denying paternity of the plaintiff.

The deceased's brother, Dr. Vernon Goss, stated that his brother did not return to Louisiana from California until 1932. He also stated that his brother had spoken to him of the birth of the plaintiff and stated that he denied that the child was his.

The Court finds that the presumption granted under the California law is not in conflict with the positive law and public policy of Louisiana and must be followed by this Court.

This Court also finds that the law of inheritance to be applied is the law of Louisiana where the decedent resided and died.

The Court is aware of the fact that the deceased and the plaintiff never communicated with each other and clearly, the deceased by his will and affidavit did not wish for the plaintiff to inherit from him. Under the

provisions of C.C. Article 1493 the plaintiff, as legitimate, is entitled to one-third (1/3) of the estate of the deceased. This, of course, is contrary to the wishes of the deceased and his family, however, the question of forced heirship is one that addresses itself to the legislature and not to the Courts.

Under the provisions of C.C. Article 1502 the donation must be reduced so that the plaintiff will receive one-third (1/3) of the estate of the deceased, Winston Goss.

Costs of Court are to be divided equally between the parties.

Appropriate judgment will be signed upon presentation.

Reasons rendered at Lafayette, Louisiana this 20 day of March, 1974.

/s/ Douglas J. Nehrbass
DISTRICT JUDGE

APPENDIX B

NO. 4778

COURT OF APPEAL, THIRD CIRCUIT
STATE OF LOUISIANA

SUCCESSION OF WINSTON D. GOSS

ROBERT WINSTON G. ZUCKSWERT
Plaintiff and Appellee

versus

GERTRUDE BRINKMAN GOSS, ET AL
Defendants and Appellants

Appeal from the Fifteenth Judicial District Court, Parish of Acadia, State of Louisiana; Hon. Douglas J. Nehrbass, District Judge, Presiding.

Before FRUGE, MILLER, and DOMENGEAUX, Judges

DOMENGEAUX, JUDGE

This is a suit to annul in part the last will and testament of Winston D. Goss, who died on January 30, 1973, so as to reduce certain allegedly excessive donations contained therein. The will is being contested by Robert Winston Goss Zuckswert, contending that he is the only son and heir of the testator and therefore entitled to one-third (1/3) of the testator's estate as his

forced portion. After a trial on the merits, judgment was rendered in favor of the plaintiff recognizing him to be the sole legitimate child and forced heir of the decedent, declaring the will null and void insofar as it purported to donate in excess of the decedent's disposable portion, and reducing proportionately the donations contained therein. From said judgment Gertrude B. Goss, widow of the decedent and executrix of the estate, in addition to the other legatees named in the will, have appealed to this court.

The pertinent facts leading up to this suit are as follows: Winston D. Goss and Mildred Fabricius were married on May 26, 1928, in the state of California. Some two years later, in August, 1930, the wife filed suit for a California divorce and subsequently an interlocutory judgment of divorce was granted on October 31, 1930. A final divorce was granted in the same proceedings on November 25, 1931.

Early in 1932 Winston D. Goss left California and returned to the home of his parents in Acadia Parish, Louisiana. He remained in Acadia Parish until his death.

Subsequently, Robert Winston Fabricius, the plaintiff herein, was born to Mildred Fabricius on August 24, 1932, (274 days after the final divorce decree and 693 days after the interlocutory judgment in Oakland, California). Winston D. Goss was listed in the birth certificate as the father of the plaintiff.[1]

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1 The certificate of birth listed the plaintiff as Robert Winston "Fabricius" (rather than "Goss"). Plaintiff's mother testified that the discrepancy was probably due to her own mother who gave this information to the hospital. The certificate of birth was subsequently corrected by affidavit.

Mildred Fabricius remarried in November, 1933, to David E. Zuckswert. Plaintiff's name was subsequently changed by his mother, without his knowledge, in 1947, from Robert Winston Goss to Robert Winston Zuckswert.

Winston D. Goss also married a second time on December 31, 1938, to Gertrude Brinkman, with whom he resided until his death. No children were born of this latter marriage.

As aforementioned, Winston D. Goss died on January 30, 1973, leaving a last will and testament, disposing of all of the property of his estate to various legatees (his wife by the second marriage, certain living brothers and sisters, and certain descendants of a deceased brother).

On the same day the last will and testament was prepared (December 4, 1970), Goss also executed a written affidavit to the effect that he had knowledge of the birth of plaintiff to his first wife on August 24, 1932, but that he had been separated from her since 1930 and that he was not the father of this child.

Plaintiff brought this action on April 5, 1973.

The first issue presented is whether the plaintiff is the legitimate son of the decedent, Winston D. Goss.

At the outset, this issue presents the question of which state law (California or Louisiana) would control plaintiff's status relating to his birth rights?

We are of the opinion, as was the trial judge, that California law should apply.

Under general conflict of laws doctrine, the law of the domicile, the lex domicilii, governs and controls the STATUS of the individual. 15 C.J.S., Conflict of Laws § 14 (2), p. 467; 16 Am. Jur. 2d, Conflict of Laws § 12, p. 26. Likewise once status attaches, it usually follows the person and is recognized elsewhere.

STATUS includes such conditions as marriage, adoption, infancy, and LEGITIMACY. 15 C.J.S., supra, cited in *Sun Oil Co. v. Guidry*, 99 So.2d 424 (La. App. 1st Cir. 1957).

The jurisprudence of this state has recognized the status of *adoption*,[2] *infancy*,[3] and *marriage*,[4] to be controlled by the law of the domicile of the parties whose status is questioned.

Likewise, *legitimacy* has clearly been held to be determined by reference to the law at the place of domicile where the infant is born. See: 15 C.J.S. Conflict of Laws, § 14 (8), p. 479.

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2 *Welch v. Jacobsmeyer*, 216 La. 333, 43 So.2d 678 (1949); *Succession of Caldwell*, 114 La. 195, 38 So. 140 (1905); *Alexander v. Gray*, 181 So. 639 (La. App. 2nd 1938); *Kuchenig v. California Co.*, 410 F.2d 222 (5th Cir. 1969).

3 *Barrera v. Alpuente*, 6 Mart. (N.S.) 69 (1827); *Sun Oil Co. v. Guidry*, supra.

4 *Gibbs v. Illinois Cent. R. Co.*, 169 La. 450, 125 So. 445 (1929); *Parish v. Minvielle*, 217 So.2d 684 (La. App. 3rd Cir. 1969); *Dupre v. Rochester Ropes, Inc.*, 216 So.2d 589 (La. App. 3rd Cir. 1968).

In *Scott v. Key*,[5] 11 La. Ann. 232 (1856), an infant was born out of wedlock to a resident in the state of Arkansas. Thereafter, while continuing to reside with his natural father in Arkansas, a state statute was passed by the legislature in which the child was declared legitimate. Thereafter the father and son became residents of Louisiana. After the death of both father and son a dispute arose among the collateral heirs of the father and the heirs of the son as to inheritance of real property located in Louisiana. The court held that under Arkansas law the child was legitimate, that such status followed him across state lines, and as a result he was heir to his father under Louisiana law. It was stated as "a well settled principle, that the status or condition, as to the legitimacy, must be determined by reference to the law of the country where such status or condition had its origin". In addition the court observed that the Arkansas statute did not conflict with the Louisiana law of inheritance.

Similarly in *Marzette v. Cronk*, 141 La. 437, 75 So. 107 (1917) our Supreme Court recognized the legitimate status of two children, such status having been created by an 1866 Arkansas statute which declared that the marriages of all persons of color who were then living together as husband and wife were valid and that their children were legitimate.

This same principle has likewise been followed in a number of cases where children were deemed legitimate by a valid marriage (outside of Louisiana) which would not have been legal within the state, i.e. miscegenous marriage — *Succession of Caballero v.*

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5 Cited in *Succession of Fisher*, 235 La. 263, 103 So.2d 276 (1958).

The Executor, 24 La. Ann. 573 (1872); common law marriages — *Doiron v. Vacuum Oil Co.*, 164 La. 15, 113 So. 748 (1927); *Chivers v. Couch Motor Lines, Inc.*, 159 So.2d 544 (La. App. 3rd Cir. 1964).

The spirit of comity existing between the several states of our country requires that Louisiana recognize the STATUS of the plaintiff herein as created by California law unless by so doing we would violate the positive law or public policy of our own state. *Succession of Fisher*, supra.

The pertinent California law (§ 661 — California Code of Evidence) provides the following:

> "§ 661. Legitimacy. A child of a woman who is or has been married, born during the marriage or within 300 days after the dissolution thereof, is presumed to be a legitimate child of that marriage. This presumption may be disputed only by the people of the State of California in a criminal action brought under Section 270 of the Penal Code or by the husband or wife, or the descendant of one or both of them. In a civil action, this presumption may be rebutted only by clear and convincing proof."

The California courts have repeatedly held that dissolution of marriage occurs only after a final decree of divorce has been rendered. *Olson v. Superior Court*, 175 Cal. 250, 165 P. 706 (1917); *Louis v. Louis*, 7 Cal. App. 3rd 851, 86 Cal. Rptr. 834 (1970); *Green v. Green*, 66 Cal. App. 2d 50, 151 P.2d 679 (1944).

Thus under the California statute, upon birth, the presumption of legitimacy attached to the plaintiff by reason of being born within 300 (actually 274) days after the divorce between Winston and Mildred Goss.

This statute is neither in conflict with our positive law or in violation of the public policy of this state. In fact Civil Code Art. 186, in part, recognizes the same presumption of legitimacy as the California statute, insofar as a child born within 300 days of the dissolution of the marriage is concerned.

Louisiana law (Civil Code Art. 186) further provides that a person born more than 300 days after a "sentence of separation from bed and board" would lose the presumption of legitimacy. The defendants therefore contend that plaintiff should be deemed illegitimate due to the fact he was born some 693 days after the California "interlocutory decree of divorce", which allegedly has the same civil effects as our Louisiana "separation from bed and board".

Assuming, arguendo, that the "interlocutory decree" for all practical purposes can be likened to our "separation from bed and board", we do not feel that this conflict is of the type which precludes the application of California law herein. As aforementioned, the California law is *not* actually in conflict with Louisiana law. It is only the application of our own different law [i.e. — non presumptive status of a person born 300 days after sentence of separation from bed and board] to a person deemed legitimate at birth in California that raises a conflict.

Our courts have not heretofore refused to apply the law of another state in respect to legitimacy (or any other status) merely because the child, if born in Louisiana, would not have been considered legitimate (or adopted, etc.) under our law.

Likewise it is clear that recognizing plaintiff's status as a legitimate child is not in violation of the public policy of this state. In fact our public policy is clearly reflected by our laws, which insure that the legitimacy of a child will be maintained whenever possible [*Stewart v. Stewart*, 233 So.2d 305 (La. App. 1st Cir. 1970)], provide presumptions of the strictest nature [LSA C.C. Arts. 184-192], and protect helpless children, born legitimate, from illegitimation by one or both of their parents for their own selfish aims [*Tannehill v. Tannehill*, 226 So.2d 185 (La. App. 3rd Cir. 1969), affirmed 261 La. 933, 261 So.2d 619 (1972)].

As a result of the foregoing, we feel constrained to follow the law of California in respect to the plaintiff's presumption of legitimacy.

The next question is whether the evidence presented at trial was sufficient to rebut this presumption.

In this regard, plaintiff's mother testified essentially the following: Immediately after the marriage in 1928 between Mildred Fabricius and Winston Goss, the couple lived with the wife's parents in their home in Richmond, California. Subsequently, they moved in order that Goss could obtain work, but later returned to Richmond where they lived in a small house to the rear of Mildred's parents.

During 1930 the couple began to have marital problems and they became physically separated for a period, with Mildred moving in with her parents and Goss renting an apartment in the same town. Subsequently Mildred filed for a divorce (with the interlocutory decree being entered on October 31, 1930), however, the couple continued to see each other, often going out and spending hours alone at Goss' apartment.

Finally, around October, 1931, the two decided to attempt a full reconciliation, and as a result they moved back into the Fabricius home. The couple lived together as husband and wife through the Thanksgiving, Christmas, and New Years holidays, but near the end of January, 1932, or the first of February, conditions worsened between them, and Goss left Mildred and the Fabricius home, subsequently returning to Louisiana.

Mildred further testified that she became pregnant in November, 1931, that Goss was the father of the child, that she dated no one else, and that Goss knew of her pregnancy.

After Goss left his wife early in 1932, Mildred stated she returned to the office of her attorney where she picked up the papers in her final divorce, which had been previously taken up without testimony and was rendered on November 25, 1931.

Thereafter she indicates she remarried and had no further contact with Winston Goss. She stated that from time to time she would, however, hear of the news

regarding him from correspondence with the wife of Goss' brother (both of whom lived for a period in California and became friends with plaintiff's mother).

This testimony is further corroborated by depositions of Gladys Bygum (sister to plaintiff's mother), Virginia Catamby (sister-in-law to plaintiff's mother), and Dora Combes (sister to the wife of Winston Goss' brother) — specifically the fact that Mildred and Winston Goss were attempting to reconcile their problems during the holiday months in 1931 and 1932 and lived as husband and wife in the Fabricius home. Dora Combes even stated that while visiting in Louisiana about 1938 that Goss inquired several times as to whether the plaintiff, his "son", looked like him.

In summary, this testimony preponderates to the effect that co-habitation between Mildred and Winston Goss took place not only after the California interlocutory decree, but also following the final divorce, and that plaintiff was conceived before the final divorce was signed. Under these facts both Louisiana law[6] and California law[7] would give plaintiff a presumption of legitimacy.

In attempting to rebut the presumption of legitimacy, defendants introduced testimony of (a) the widow of Winston Goss who could only testify that she

6 LSA C.C. Art. 188. *Kaufman v. Kaufman*, 146 So.2d 199 (La. App. 4th Cir. 1962).

7 § 621, California Code of Evidence — "Legitimacy: Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is conclusively presumed to be legitimate."

asked her former husband whether he had any children by his first marriage and he answered in the negative; (b) a brother to the decedent who testified that the possibility of Goss having a son was talked about in the family for many years, but that the decedent had denied it, and; (c) other witnesses who merely testified only to plaintiff's reputation, character, etc. and not to facts pertinent to the issues in this case.

Defendants likewise introduced an affidavit allegedly signed by the mother of plaintiff for her final judgment of divorce wherein it was stated the parties had not been reconciled, lived together, or cohabited since the granting of the interlocutory judgment. Plaintiff's mother indicated that she did sign numerous legal papers and documents upon her attorney's advice, which she did not know the content of, at the inception of the divorce, and that she attended court at that time. Thereafter, however, she stated that she signed no other papers, nor did she go back to Court. She further denied signing any affidavit with the knowledge that it contained the statements as alleged.

The blood types of plaintiff, his mother and the decedent were stipulated to. A pathologist testifying at trial stated that the plaintiff's blood type was consistent with that of his mother and the decedent. He further indicated that the probabilities were at least one out of every four times that a combination of blood groups, as alleged, would result in plaintiff's blood type.

Under the foregoing evidence presented the trial judge concluded that defendants failed to rebut the

presumption of legitimacy granted to the plaintiff. We find no manifest error in this conclusion.

The next issue is what inheritance rights, if any, the plaintiff has, as legitimate son of the decedent Winston Goss.

At the outset we can quickly dispose of the defendants' assertion that plaintiff is estopped from asserting any claim to this estate by reason of the doctrine of equitable estoppel. It is argued that the doctrine applies because plaintiff found out about his alleged father almost twenty years prior to the suit, yet he made no effort to contact Winston Goss or made any claims for support, inheritance, etc. until the death of Goss in 1973. However, we find no cases which require the plaintiff to seek out his father, demand support, or otherwise be prejudiced to the extent of not being able to claim an inheritance. We opine that this is clearly not a situation for the application of the doctrine of equitable estoppel. None of the elements of estoppel exist. *American Bank and Trust Co. v. Trinity Universal Ins. Co.*, 194 So.2d 164 (La. App. 1st Cir. 1966).

In regard to plaintiff's inheritance rights, the question again arises as to which law is to apply, either California or Louisiana? The trial judge applied Louisiana law and we concur in this holding.

Louisiana follows the general rule that succession to immovable property is determined by the law of the situs of the land. [*Succession of Fisher*, supra; *Cox v. Von Ahlefeldt*, 105 La. 543, 30 So. 175 (1900); *Berthelot v. Fitch*, 44 La. Ann. 503, 10 So. 867 (1892); *Succession of*

King, 201 So.2d 335 (La. App. 4th Cir. 1967); *Succession of Simms*, 175 So.2d 113 (La. App. 4th Cir. 1965), affirmed 250 La. 177, 195 So.2d 114; *Succession of Martin*, 147 So.2d 53 (La. App. 2nd Cir. 1962); 15 C.J.S., Conflict of Laws § 19 (1), p. 507; 16 Am. Jur.2d, Conflict of Laws § 14, p. 27] and that movable property is transferred in conformity with the law of decedent's domicile. *Succession of Fisher*, supra; *Williams v. Pope Mfg. Co.*, 52 La. Ann. 1417, 27 So. 851 (1900); *Succession of Simms*, *supra*.

In this case both the domicile of the decedent, as well as the situs of his immovable property, is Louisiana.

Under Louisiana law plaintiff, as the sole legitimate child of the decedent, is a forced heir and entitled to 1/3 of all of the property belonging to his father. LSA C.C. Art. 1493.

Inasmuch as Winston D. Goss disposed of all of his property to his wife and collaterals, or descendants of the latter, these legacies are null and void insofar as they are in excess of the decedent's disposable portion and said donations have to be reduced proportionately. LSA C.C. Art. 1502, 1504.

For the above and foregoing reasons the judgment of the trial court is affirmed. Costs of this appeal are assessed against defendants-appellants.

AFFIRMED.

APPENDIX C

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

March 7, 1975

SUCCESSION OF WINSTON D. GOSS
ROBERT WINSTON G. ZUCKSWERT

versus No. 55,846

GERTRUDE BRINKMAN GOSS, ET AL

In re: Gertrude Brinkman Goss, et al, applying for Certiorari, or writ of Review, to the Court of Appeal, Third Circuit, Parish of Acadia.

Writ denied; no error in result.

/s/ AT Jr.
/s/ JWS
/s/ FWS
/s/ MEB
/s/ JAD
/s/ PFC
/s/ WFM

A TRUE COPY,
Clerk's Office
Supreme Court of Louisiana
New Orleans,
March 7, 1975

/s/ Phil Trice
Deputy Clerk

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-972

GERTRUDE BRINKMAN GOSS, ET AL.,
Petitioners,

versus

ROBERT WINSTON G. ZUCKSWERT

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s).

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 4, 1975.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 28th
day of May, 1975.

APPENDIX E

Brief filed with Third Circuit Court of Appeals for the State of Louisiana:

> "The District Court applied California law to determine plaintiff's status as a legitimate child of the decedent, and then applied Louisiana law to permit him to inherit under our doctrine of forced heirship. It is important to note that if only California law had been applied to determine both status and the right to inherit, then the plaintiff would not have inherited since, as stated, there is no forced heirship in California. By the same token if only Louisiana law had been applied to determine both status and the right to inherit, then the plaintiff would have had no presumption of legitimacy and, as we have shown, he did not prove legitimate filiation. Thus, plaintiff's claim would have been rejected under Louisiana law. The District Court erred by inconsistently applying California law in the first instance to determine legitimacy and then employing Louisiana Law to grant the right to inherit. This result is unsound and should be overturned."

Application for rehearing filed with Third Circuit Court of Appeals for the State of Louisiana:

> "The decision of this Court incongruently applied the law of California and Louisiana in such a manner as to reach a result not contemplated under the law of either state. California law, as interpreted by the Court, provides that a child born within 300 days af-

> ter the dissolution of a marriage is presumed to be a legitimate child of that marriage (Section 661 — California Code of Evidence). The Court further recognizes that California has an Interlocutory Judgment of Divorce similar to our Judgment of Separation. In California, as in Louisiana, dissolution of the marriage occurs only after divorce. Even if the plaintiff has met the test for legitimacy contained under California law, he still cannot demand a share of the decedent's estate under that law since California does not recognize forced heirship."

Application for Writ of Certiorari to the Louisiana Supreme Court:

> "The Court of Appeal applied California law to determine plaintiff's status as a legitimate child of the decedent. Louisiana law was then applied to permit him to inherit under our doctrine of forced heirship. If only California law had been applied to determine both status and the right to inherit, then the plaintiff would not have inherited since, as stated, there is no forced heirship in California. By the same token if only Louisiana law had been applied to determine both status and the right to inherit then the plaintiff would have had no presumption of legitimacy since he was born more than 300 days after the interlocutory judgment of divorce. Thus, plaintiff's claim would have to be rejected under the law of either state. . . ."